

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARK E. FIX,)
)
Plaintiff,)
) CIVIL ACTION NO. 04-97E
v.)
) JUDGE COHILL
UNITED STATES OF AMERICA,) MAGISTRATE JUDGE BAXTER
UNITED STATES BUREAU OF PRISONS,)
) (Electronic Filing)
Defendant.)

DEFENDANT'S MOTION TO COMPEL DISCOVERY

AND NOW, comes Defendant, United States of America, through its attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Michael C. Colville, Assistant U.S. Attorney for said district, and, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, respectfully moves the Court to issue an Order compelling Plaintiff to produce documents and records which are responsive to Defendant's First and Second Request for Production of Documents. In support of this Motion, Defendant avers as follows:

1. On July 28, 2005, this Court issued a Pre-Trial Order directing that all discovery be completed by the parties on or before October 31, 2005. The discovery period was subsequently extended by Order of Court dated October 26, 2005 until January 6, 2006.

2. On August 25, 2005, Defendant forwarded its First Request for Production of Documents to Plaintiff. (See, Defendant's First Request for Production of Documents attached hereto and identified

as Exhibit A.) In this regard, Defendant requested that Plaintiff produce:

1. Any and all documents concerning, supporting or relating to any expert that you may call at the time of trial in this case including, but not limited to, the following:

- a. Curriculum vitae, resume or list of qualifications;
- b. List of any articles, books, or other learned documents such expert may have written or assisted in writing;
- c. Copy of any reports that such expert has furnished to the Plaintiff;
- d. Documents furnished to the expert for support, work papers, reference material, or any other supporting documents;
- e. Documents generated by such expert.

3. On October 20, 2005, Defendant forwarded its Second Request for Production of Documents to Plaintiff. (See, Defendant's Second Request for Production of Documents attached hereto and identified as Exhibit B.) In this regard, Defendant requested that Plaintiff produce:

1. Any and all MRI films, CT Scans and reports documenting treatment or testing received by Plaintiff for his Lyme Disease or Multiple Sclerosis diagnosis.
2. Any and all medical reports, MRIs, CT Scans, films, x-rays, diagnostic test results, or examination reports, that have been prepared, maintained, or ordered by any and all Neurologists or Infectious Disease specialist who have treated or examined Plaintiff for his Lyme Disease or Multiple Sclerosis diagnosis.

4. On or about April 7, 2007, and May 30, 2006, Plaintiff's neurological expert, Dr. Mitchell S. Felder, prepared two separate expert reports. (See, Dr. Felder's two expert reports attached and identified collectively as Exhibit C.)

5. In the April 7, 2006 report, Dr. Felder indicated that he had examined Plaintiff and that in order to rule out a diagnosis of Multiple Sclerosis, Plaintiff would be obtaining a chest x-ray, blood work, EKG and an MRI of the brain. In that same report, Dr. Felder also indicated that he had discussed the possibility of Plaintiff undergoing an "LP" (lumbar puncture).

6. In the May 30, 2006 report, Dr. Felder reported on the results from a lumbar puncture test which showed "an increase in oligoclonal bands and CSF IGG index which may also be interpreted as supportive as a Demyelinating Disease such as Multiple Sclerosis." (Exhibit C.)

7. Upon receipt of Dr. Felder's expert reports, Defendant contacted Plaintiff's counsel via e-mail and asked Plaintiff's Counsel to produce the documents, records and test results that were referenced in each of Dr. Felder's reports as they were requested previously as part of Defendant's First and Second Request for Production of Documents. (See, July 3, 2006 e-mail attached hereto and identified as Exhibit D.)

8. On July 18, 2006, a Settlement Conference in the above matter was conducted by Magistrate Judge Baxter. During that conference, Plaintiff's Counsel indicated to the Court and Counsel for Defendant that he would produce copies of any and all MRI films not produced as well as copies of any and all records or reports related to tests conducted by Dr. Felder. A letter documenting

this discussion was sent to Plaintiff's Counsel on July 19, 2006. (See, July 19, 2006 letter attached hereto and identified as Exhibit E.)

9. By e-mail dated August 10, 2006, Defendant reminded Plaintiff's Counsel that he had yet to produce the medical records, test results and MRI films that were referenced in Dr. Felder's expert reports. (See, e-mail dated August 10, 2006 attached hereto and identified as Exhibit F.)

10. A subsequent e-mail dated August 22, 2006 was sent wherein Plaintiff's Counsel was informed that if a response to the discovery requests was not provided by September 8, 2006 that a Motion to Compel would be filed. (See, e-mail dated August 22, 2006 attached hereto and identified as exhibit G.)

11. On September 6, 2006, the parties met at the offices of the United States Attorney and discussed various matters including the outstanding discovery responses. At that meeting, Plaintiff's Counsel promised to provide the requested documents.

12. To date, Plaintiff has failed to produce any of the documents referenced in Dr. Felder's two expert reports.

13. Discovery in this matter is outstanding through no fault of Defendant.

14. The trial in this matter has not yet been scheduled. However, Defendant's Pretrial Statement is due on or before October 16, 2006 and Defendant would like an opportunity to have its own

experts review the documents and test results which are referenced in both of Dr. Felder's reports.

WHEREFORE, Defendant, United States of America respectfully requests that the Court issue an Order compelling Plaintiff to file detailed and complete answers to Defendant's First and Second Request for Production of Documents.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

/s/ Michael C. Colville
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2006, a true and correct copy of the within Defendant's Motion to Compel Discovery has been served electronically and/or first-class mail, to and upon the following:

Lawrence D. Kerr, Esquire
BERK, WHITEHEAD, CASSOL,
FELICIANI & KERR
115 North Main Street
Greensburg, PA 15601

/s/ Michael C. Colville
MICHAEL C. COLVILLE
Assistant U.S. Attorney